No. 15264

United States Court of Appeals

For the Ninth Circuit

ORION SHIPPING AND TRADING COMPANY, a Corporation, and PACIFIC CARGO CARRIERS CORPORATION,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

BOGLE, BOGLE & GATES
ROBERT V. HOLLAND
Attorneys for Appellants.

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United States Court of Appeals
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Orion Shipping and Trading Company, a Corporation, and Pacific Cargo Carriers Corporation,	*Appellants,*	No. 15264
vs.		
United States of America,	*Appellee.*	

Appeal from the United States District Court for the Western District of Washington, Northern Division

REPLY BRIEF OF APPELLANTS

COMMENT ON APPELLEE'S COUNTER-STATEMENT OF THE CASE

While wholly immaterial to a discussion of the merits of the errors assigned by the appellant, the appellee insists on calling the Court's attention to a so-called "warning," given by Judge Lindberg in the early stages of the case in Cause Number 15261 in which the Government's motion for dismissal was initially granted. The appellee makes the following statement in its brief (page five):

> "Actually, as early as December 6, 1954, in the companion case, No. 15,621, now consolidated with this case on appeal, Judge Lindberg granted the Government's motion and dismissed the third party complaint (R. 6). A motion to vacate the dismissal was subsequently granted, without opposition from the Government, in order that the case

could be transferred to Judge Bowen before whom the other six law cases were then pending."

There was no opposition from the Government on the motion to vacate only for the reason that it was the inadvertence of Government counsel which resulted in the initial order being entered without argument. Also, the vacating of the dismissal was to correct this inadvertent error and a subsequent transfer to Judge Bowen was made as had been originally planned. The actual reasons for the entering of the order and subsequent vacation thereof are not revealed by the appellee but are included in this brief (See Appendices A and B).

Appellee also argues that the mere reservation by the trial court of the motion to dismiss until the time of trial would constitute a "warning" to the appellant. The appellant's attorney, however, flatteringly referred to by the appellee as "experienced admiralty counsel," knew from past experience with Judge Bowen that the reservation of pretrial motions until time of trial would not be indicative of the ultimate ruling on said motions.

Appellee refers to an "astonishing feature of this case" as being the filing of twelve separate cases against the United States arising out of the gassing incident. Appellee fails to advise this Court that three of the seamen brought simultaneous actions at law and in admiralty and that subsequently the three admiralty cases were dismissed. Of the remaining nine cases, two were instituted in New York by two seamen who, of course, had the right to select their own forum and in which forum

the defendant Orion similarly had the right to implead the United States of America. Thus it can hardly be said that the appellant has fostered a multiplicity of action, particularly when it is recalled that the appellant was the party who moved to consolidate the seven cases for trial.

All of the foregoing is immaterial to the merits of this cause but is set forth in answer to appellee's comment that the appellant "made improper use of third party procedure" (page 6), "stubbornly persisted in their vexatious course of multiple suits" (page 9), "intended to obscure the real nature of the action" (page 13), and "have harassed the United States with all of the several suits pointed out above and have, in the main, used third party procedure to accomplish this multiplicity of action" (page 33). The procedure followed by appellant was specifically intended to save time and expense in this multiple litigation.

COMMENT ON APPELLEE'S SUMMARY OF ARGUMENT

It is interesting to note the appellee's repeated assertions that the procedural steps taken by the appellant have resulted in "needless multiplicity of actions" in view of what would happen in this case if the ruling of dismissal by the trial court of the third party claim is permitted to stand. Appellee has already set forth in its brief (Appendix B) the libel pending in the Southern District of New York against the United States for the total sum of the judgments entered on behalf of the plaintiffs in these seven consolidated causes. Thus, in New York, the entire case on the merits would

have to be retried. The New York Judge would be required to listen to the identical extensive testimony with reference to the alleged negligence of the Government and lack of negligence of the appellant, Orion, as that heard by Judge Bowen. In the alternative, if this case is remanded to Judge Bowen with instructions to proceed to a decision on the third party cause of action against the appellee, no further testimony will need be presented since Judge Bowen has heard the entire cause against the Government and is in a position, *at this time,* to rule on the merits of the claim for recovery over. Such further proceedings would require only argument of counsel on the evidence already heard by the trial court together with its oral or written opinion thereon. It is to be recalled that Government counsel participated fully in all phases of the trial below, including both the personal injury actions and the third party proceedings. This can hardly be described as a "multiplicity of actions" when compared to the alternative necessary of re-trying the entire case in the New York court. The mere fact that seamen Wilson and Hiddick have started actions against Orion in New York followed by the third party impleading of the United States of America is of no moment to this court in determining that the most legally justifiable and expeditious step at this time would be to direct Judge Bowen to re-assume jurisdiction of the third party case already heard by him.

Generally on multiplicity of actions, the Tenth Circuit has held as follows in *United States v. Accord,* 209 F.(2d) 709 (Cert. den. 98 L.ed. 1115):

"Rule 14 was derived from Admiralty Rule 56.

See 28 U.S.C.A., Rules, p. 119. Rule 14 was formulated and adopted in keeping with the purpose of the Federal Rules of Civil Procedure to simplify and expedite procedure. The purpose of Rule 14 was to accomplish in one proceeding the adjudication of the rights of all persons concerned in the controversy and to prevent the necessity of trying several related claims in different lawsuits. The rule should be liberally construed to effectuate its intended purposes."

On the availability of *third party procedure* to facilitate the trial of multiple claims, the United States Supreme Court has stated in *United States v. Yellow Cab Co.,* 340 U.S. 543, 71 S.Ct. 399, 406, 95 L.ed. 523:

"Once we have concluded that the Federal Tort Claims Act covers an action for contribution due a tort feasor, we should not, by refinement of construction, limit that consent to cases where the procedure is by separate action and deny it where the same relief is sought in a third-party action.

* * *

"The Government suggests that difficult procedural problems may arise in other cases if a waiver of immunity is held to exist in these cases. For example, the Act requires claims against the United States to be tried without a jury and, although a jury was not insisted upon in the instant cases, the Seventh Amendment to the Constitution preserved to private individuals their right of trial by jury on such claims in a federal court. The Government argues that the Act is not sufficiently specific to permit two such different modes of trial to arise in the same case.

"Such difficulties are not insurmountable. If, for example, a jury had been demanded in the Yellow

Cab case, the decision of jury and non-jury issues could have been handled in a manner comparable to that used when issues of law are tried to a jury and issues of an equitable nature in the same case are tried by the court alone. If special circumstances had demonstrated the inadvisability, in the first instance, of impleading the United States as a third-party defendant, the leave of court required by Rule 14 could have been denied. If, at a later stage, the situation had called for a separation of the claims, the court could have ordered their separate trial. Fed. Rules Civ. Proc. 42 (b). The availability of third-party procedure is intended to facilitate, not to preclude, the trial of multiple claims which otherwise would be triable only in separate proceedings. The possibility of such procedural difficulties is not sufficient ground for so limiting the scope of the Act as to preclude its application to all cases of contribution or even to all cases of contribution or even to all cases of contribution arising under third-party practice. If the Act develops unanticipated complications, Congress can then meet them to such extent as it may desire to fit the demonstrated needs."

COMMENT ON APPELLEE'S ARGUMENTS ON JURISDICTION

Without providing a single citation in support thereof, appellee makes the bald statement that the doctrine of ancillary jurisdiction, urged by the appellant, applies only to suits where it is required by the Court's custody of property or assets which are the subject of the various claims. Counsel for appellee obviously failed to read *United States v. Acord, et al., supra,* cited by appellant in its brief. That case involved a cause of

action for damages against a railroad under the Federal Employers Liability Act in which the United States was an impleaded third party under the Federal Torts Act. Nowhere in the case does there appear the presence of any "property or assets in the custody of the Court" and the holding by the Tenth Circuit on this doctrine is as follows (p. 712):

> "It has been held that a proceeding on a third-party plaintiff's claim under Rule 14 is an ancillary proceeding incidental to the main action and that no separate ground of jurisdiction is required."

The Court will recall that in our opening brief we noted that the foregoing statement was supported by cases from the Second and Tenth Circuits and from 14 District Courts. In view of appellee's completely unsupported statement that the doctrine is applicable only to cases wherein property or assets are in the custody of the Court, we have very carefully reviewed these 16 footnote cases and find that they include 9 cases for personal injury, 3 cases for death, 2 on contract, 1 on S.E.C. violations, 1 on patent infringement and 1 on a claim for stock assessment. We further find that *none* of the foregoing cases involved property or assets in the custody of the Court and that all supported the general rule on ancillary jurisdiction quoted above in the *Acord* case.

The appellee refers to the case of *Higa v. Transocean Airlines,* 230 F.(2d) 780, 1956 A.M.C. 122 (9 Cir. 1955). That case is not strictly applicable since it interprets the Death on the High Seas Act, the pertinent portion of which act, reads as follows:

> " * * * the personal representatives of the decedent may maintain a suit for damages in the district courts of the United States, *in Admiralty,*" (Emphasis added)

It is of particular interest to note in that case that on a petition for re-hearing the appellant raised for the first time the question of whether the case should have been dismissed by the District Court or transferred to its admiralty docket. This Court refused to consider that phase of the matter only because the appellant was belatedly attempting to enlarge the scope of her appeal in a petition for re-hearing. However, this court in a footnote, referred to earlier 9th Circuit cases on the procedure of transfering from law to the admiralty docket as follows:

> "This court may so remand an appropriate case. See *Twin Harbor Stevedoring & Tug Company v. Marshall,* 9 Cir. 1939, 103 F.(2d) 513; *Kobilkin v. Pillsbury,* 9 Cir., 1939, 103 F.(2d) 667."

In the *Twin Harbor* case, *supra,* this Court, in a suit to set aside an award of the deputy commissioner under the Longshoremen's and Harbor Workers'' Act found that the appellants had filed their bill as a complaint at law rather than as a libel on the admiralty side of the District Court. In considering this fact and in making appropriate disposition thereof this Court stated:

> "Appellants should have filed their bill as a libel on the admiralty side of the District Court. *Crowell v. Benson,* 285 U.S. 22, 37, 49, 52 S.Ct. 285, 76 L.ed. 598. We have considered the merits for the guidance of the court below, as if we were reversing a case at law for an erroneous instruction, and nev-

ertheless passing on questions of evidence certain to arise in a new trial. The cause is remanded with instructions to treat the bill as a libel, the motion to dismiss as an exception to its sufficiency (Admiralty Rule Rup. Ct. 27, 28 U.S.C.A. following section 723), and to enter a decree of dismissal.

"The decree is vacated, *with instructions to transfer to Admiralty docket* and decree a dismissal." (Emphasis added)

An almost identical disposition was made in the *Kobilkin* case, *supra.*

Appellee refers to the decision of Judge Mathes of the Southern District of California in *Kunkel v. United States,* 140 F.Supp. 591, 595, 1956 A.M.C. 1195, 1199 (S.D. Cal.), to demonstrate the inherent difference between law and admiralty. In that case the widow of the deceased sought recovery against the Government under the Death on the High Seas Act. The action was brought at law and the Government moved to dismiss on the ground that the Death on the High Seas Act required the institution of suit on the admiralty side. But for one circumstance in the case, Judge Mathes would have transferred this matter to the admiralty docket. He stated as follows (p. 594):

"Also to be noted is the circumstance that causes of action on such claims are given by the Act to 'the personal representative of the decedent' alone. For were it not for the fact that here the widow, too, is joined in her personal capacity as party plaintiff, it would be a simple matter to transfer this case to the admiralty docket. *Cf. Higa v. Transocean Airlines, supra,* on rehearing, 230 F. (2d) 786; *Koblikin v. Pillsbury,* 9 Cir., 1939, 103

F.(2d) 667-671, affirmed, 1940, 309 U.S. 619, 60 S.Ct. 465, 84 L.Ed. 983."

Thus Judge Mathes, save for the dual status of the widow in the suit, would have transferred the case to the admiralty docket just as the trial court here should have done and adjudicated the third-party claim.

Appellee apparently feels aggrieved that the cause of action against it was not tried under admiralty rules of procedure. It is to be noted, however, that it was very clearly determined at the outset of the case that the court and all parties agreed that insofar as any evidence was produced reflecting on the claimed liability of the United States, said evidence would be considered by the court as the trier of the fact and not by the jury. *See Transcript pages 50-54.* Following this procedure, opening statements on the third-party cause of action were made in the absence of the jury (Tr. 54) and so likewise were the arguments on that cause of action heard in the absence of the jury at the termination of the case (See Tr. 56). Appellee cites no prejudice whatsoever resulting from this procedure. In fact it is a common occurrence that courts concurrently try cases at law with juries, reserving admiralty phases of the case for their own determination (such as the joinder of claims for negligence, unseaworthiness and maintenance — appellant's brief, p. 6). While the appellee states that "it is clear" from the language of the trial court that he understood the problem was one of jurisdiction and lack thereof, it is equally clear that no such inference can fairly be drawn from reading of the entire recovery over proceedings (Tr. 56) and the court's oral opinion on the motion to transfer (Tr. 97). The

recovery over proceedings involved only the question of venue and the court ruled thereon and dismissed the cause for lack of venue. It is for this reason that the appellant included in its specification of assigned errors (appellant's brief, page 11) only reference to the question of venue.

However, that the District Court had jurisdiction of this matter is treated extensively at pages 2-6 of appellant's brief. Merely by raising the question of jurisdiction in its answering brief, as it has a right to do, does not permit or justify the appellee in incorrectly stating that the trial court dismissed for lack of jurisdiction. In fact the trial court stated (Tr. 78):

> "In my opinion the court has jurisdiction of this third party over action against the United States."

The court at no time reversed its opinion on this aspect of the case and its eventual dismissal was solely on the ground of the lack of proof and allegation of venue. The order of dismissal entered on July 26, 1956 (Tr. 34) while merely reciting that the third party action is exclusively under the Suits in Admiralty Act (with which the appellant has no disagreement) states that the action is being dismissed only because of failure to prove proper venue under that Act.

Appellee further misconstrues the grounds for the trial court's dismissal by referring to another case considered by Judge Bowen, *Ostrom v. Weyerhaeuser Steamship Company,* W.D. Wash., Civil No. 4255 (Feb. 20, 1957). That case was materially different, however, since there, a determination was obtained early in the matter by the Government's objection to being im-

pleaded in a case in which the third party complaint alleged neither the presence of the vessel nor of the cargo in the jurisdiction of the court. Since the motion was presented to the court without supporting affidavits and without the amendment to the third party complaint to set forth the presence of the vessel or its cargo, the court rightfully, in an early stage of the proceedings, denied the motion to bring in the United States as a third party defendant. The instant case, in contra-distinction, is one in which the Government's motion was reserved until after the trial and in which trial proof of venue was offered and a request was made to amend the pleadings accordingly to supplant the lack of the allegation of venue.

The case of the *United States v. Finn,* 239 F.(2d) 679 (9 Cir., 1956) cited by appellee, is wholly inappropriate. While holding that the United States had not given consent to a counter-claim being made against it, that case did not, however, involve the presence or absence of the proper venue or the necessity of an allegation thereof.

COMMENTS ON APPELLEE'S ARGUMENT ON VENUE

A careful re-analysis of the applicable provision of the Suits in Admiralty Act, 46 U.S.C.A. 742, is necessary to answer and dispose of the appellee's continued contention that the presence or absence of the SEA-CORONET in the jurisdiction of the court during the pendency of the action was irrelevant and immaterial.

Initially, to determine the apellant's rights against the Government under the Suits in Admiralty Act, the

accident or occurrence in this case must be considered as though a private individual rather than the Government had been involved. If such had been the case, it is clear that a proceeding could have been brought in Admiralty against the vessel *in rem,* against the cargo *in rem* or against the the owner *in personam.* Since this is true, the applicability of the Act is established. Beyond this point, however, the Act has set forth certain procedural steps which must be met. The Act provides three possibilities of venue for the filing of the "libel in personam" permitted by this section. Of these three alternatives, the first need not be considered since it was not established that the suing party was a resident or had an official place of business in the jurisdiction of the lower court. The alternative as to the place where the cargo is found need not be considered since there was no proof of the presence of the cargo. The "suing party" here, however, has established or offered to establish the third alternative, namely, that the vessel was within the jurisdiction during the pendency of the action. Nowhere in the Act is it stated, as contended by appellee, that the two alternatives regarding the vessel and the cargo may be used only in the case of *in rem* claims. The Act has merely permitted a libel in personam but as a prerequisite has required that one of the three alternatives exist. While section 743 of the Act permits an election to proceed on *in rem* principles, there is still permitted only the filing of a libel in personam and no distinction is made between the three alternative prerequisites of venue.

To summarize and clarify this analysis of the Act

in relation to this case, the following is found to be true:

(1) The third party complaint proceeded *in personam* and made no election to proceed under *in rem* principles.

(2) The Act sets forth three alternative prerequisites of venue without distinguishing between *in personam* proceedings and proceedings on *in rem* principles.

(3) Of the three alternatives, the appellant established the presence of the vessel.

(4) The evidence on the presence of the vessel was sufficient to establish venue but for the trial court's error in refusing to permit the pleadings to conform to the proof and in sustaining the objection to the offer of proof as to the presence of the vessel.

CONCLUSION

The error of the trial court in ruling as it did on venue and on the motion to transfer results in multiplicity of litigation which sound judicial procedure consistently attempts to prevent. The procedure followed by the appellant was specifically designed to prevent such multiplicity.

As quoted by the Supreme Court in *United States v. Yellow Cab Company case, supra,* Judge Cardozo stated in *Anderson v. John L. Hayes Construction Company,* 243 N.Y. 140, 147, 153 N.E. 28:

> "No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy."

The fundamental distinctions between law and ad-

miralty are not dissipated nor obliterated by a judge and a jury hearing testimony simultaneously from witnesses, with the former applying said testimony to a claim before it for recovery over under a Suits in Admiralty claim, and the latter applying the testimony to a negligence claim under the Jones Act, which it is trying.

The Government participated fully in the trial below and was as able to produce evidence on all phases of this litigation on its own behalf in the Western District of Washington as in any other District Court in the country.

Procedural refinements, such as contended for by appellee are inconsistent with present-day trends designed to provide speedy and adequate justice to all parties involved.

For the above reasons, the appellant respectfully requests that this court reverse the rulings of the trial court.

Respectfully submitted,

BOGLE, BOGLE & GATES
ROBERT V. HOLLAND
Attorneys for Appellants.

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

CHARLES E. AREGOOD, *Plaintiff,* vs. ORION SHIPPING & TRADING COMPANY, a corporation. *Defendant and Third Party Plaintiff,* vs. UNITED STATES OF AMERICA, *Third Party Defendant.*	No. 3623

PETITION TO VACATE ORDER GRANTING THIRD PARTY DEFENDANT'S MOTION TO DISMISS THIRD PARTY COMPLAINT

COMES NOW the defendant and third party plaintiff herein and moves this Honorable Court for the entry of an order vacating that certain order entered by minute entry on December 6, 1954 granting third party defendant's motion to dismiss third party complaint under Rule 12 (d).

This motion is based upon the file herein and upon the attached affidavit of Robert V. Holland.

BOGLE, BOGLE & GATES
Attorneys for Defendant and Third Party Plaintiff, Orion Shipping & Trading Co., Inc., a corporation.

STATE OF WASHINGTON }
COUNTY OF KING } ss

ROBERT V. HOLLAND, being first duly sworn on oath, deposes and says: That he is one of the attorneys for the defendant and third party plaintiff herein and makes this affidavit in support of the defendant's motion to vacate the order entered on December 6, 1954 dismissing the third party complaint;

That on October 4, 1954 the following captioned pleadings were served upon your affiant:

1. Motion to dismiss third party complaint under Rule 12 (d) Federal Rules of Civil Procedure.
2. Third party defendant's memorandum of points and authorities in support of motion to dismiss third party complaint.

That on November 30, 1954 a "Notice of Motion" was served upon your affiant setting down the third party defendant's motion to dismiss for hearing; that said notice of motion contained only the following indication of the time for said motion "on the 2nd day of ————————, 1954 at 10:00 A.M."

That your affiant however in telephone conversation with Mr. Frank Cushman, Assistant United States Attorney, was advised that the motion was coming on regularly for hearing on the 6th day of December, 1954; that your affiant was also advised on that date that an identical motion in cause No. 3728 was to come on for hearing before the Honorable John C. Bowen.

That your affiant advised Mr. Cushman that he was engaged in a trial of a case in Superior Court on said date and that he requested that the matters be continued

in both courts; that Mr. Cushman advised your affiant that an Assistant United States Attorney from San Francisco was present in town for the purpose of arguing the motions among other matters but that he was agreeable to continuing the motions to a later date or striking them from the motion calendar; that Mr. Cushman agreed that he would so dispose of the matters including the motion pending in the above entitled cause.

That pursuant to said agreement your affiant was advised by Mr. Cushman that the matter in the Honorable John C. Bowen's court had been continued and/or stricken but that your affiant was advised that apparently before the Assistant United States Attorney Leonard Ware was able to continue the motion in the above entitled court, the Honorable William C. Lindberg stated that he had studied the memorandum of authorities prepared by the United States Attorney's office, that he was prepared to rule on said motion and that he thereupon did rule upon said motion, granting the motion of the United States to dismiss the third party complaint. That your affiant had intended, at the appropriate and convenient time, to submit an extensive memorandum of authorities in opposition to the Government's motion; that your affiant desired and still desires to argue the matter at length before this Honorable Court; and that for the furtherance of justice and the interests of the parties your affiant requests this Honorable Court that the order of dismissal as to the third party defendant United States of

America be vacated with leave to the parties to argue the matter on the regular motion calendar.

ROBERT V. HOLLAND

Subscribed and sworn to before me this 29th day of December, 1954.

EDW. S. FRANKLIN
Notary Public in and for the State of Washington, residing at Seattle.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

CHARLES E. AREGOOD, *Plaintiff*, vs. ORION SHIPPING & TRADING COMPANY, a corporation. *Defendant and Third Party Plaintiff*, vs. UNITED STATES OF AMERICA, *Third Party Defendant.*	No. 3623

ORDER ON DEFENDANT'S PETITION TO VACATE ORDER GRANTING THIRD PARTY DEFENDANT'S MOTION TO DISMISS THIRD PARTY COMPLAINT

The petition of the defendant, Orion Shipping & Trading Company, to vacate the order granting the third party defendant's motion to dismiss the third party complaint having come on regularly for hearing on the third day of January, 1955 and the defendant and third party plaintiff being represented by Bogle, Bogle & Gates and Robert V. Holland and the third party defendant, United States of America being represented by Assistant United States Attorney Frank N. Cushman and the court being advised that counsel for plaintiff did not desire to contest the petition, and the court having heard argument of counsel and being fully advised in the premises; now, therefore, hereby orders, adjudges and decrees:

That the defendant's petition to vacate the order granting third party defendant's motion to dismiss the third party complaint be and the same hereby is granted and that the minute entry of December 6, 1954 granting said motion to dismiss is hereby vacated.

Done in Open Court this 7th day of January, 1955.

W. C. LINDBERG
U.S. District Judge.

Presented and approved by:
ROBERT V. HOLLAND
Of Bogle, Bogle & Gates
Attorneys for Defendant and
Third Party Plaintiff

Approved:

Attorneys for Plaintiff
CHARLES P. MORIARITY
FRANK CUSHMAN
Attorneys for 3rd Party Defendant